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Subject: 224 Sea Cliff, San Francisco
Date: Friday, May 6, 2022 2:05:06 PM
Attachments: [image769779.jpg](#)
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Brent,

Here's the statement of defense. Please call with any questions.

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8 SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

9 In the matter of:

10 VIOLATION REPORT/COMPLAINT FOR
11 ADMINISTRATIVE IMPOSITION OF CIVIL
PENALTIES

12 ENFORCEMENT CASE ER2004.019.00

13 PSG Mortgage Lending Corp., PSG Capital
14 Partners Inc., and "Buyer" (Respondents)

STATEMENT OF DEFENSE

AND

REQUEST TO POSTPONE HEARING

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1 **I. INTRODUCTION**

2 This matter is not one that should be resolved with a penalty or cease-and-desist order.
3 Those persons who committed the violation at issue are not here to be penalized. The current owner
4 of the property (“Owner”) is in bankruptcy and has no assets other than the property. It therefore
5 cannot pay for anything in response to a BCDC order. Fortunately, the property is in contract, and if
6 all goes well it will soon be sold to a buyer (“Buyer”) with the assets and willingness to implement
7 the remediation that staff want and that the Violation Report/Complaint (“Complaint”) calls for in
8 vague terms. Nonparty Paul Greenfield is working to complete the sale and prepare a specific
9 engineering report that will satisfy BCDC staff. If this proceeding scares off the Buyer—which it
10 could, since it is directed at the Buyer even though the Buyer has not committed any violation and is
11 not subject to BCDC jurisdiction—then there will be no money to achieve the goals that BCDC
12 wants. Moreover, even if the Buyer completes the sale and takes ownership, this proceeding cannot
13 bind the Buyer because BCDC does not have jurisdiction over the Buyer. BCDC will have to go
14 through the entire process again.

15 The hearing should therefore be postponed so that Mr. Greenfield can submit the engineering
16 report for staff’s review, which he will do within the next 60 days if the hearing is postponed, and so
17 that the Buyer can have an opportunity to cure the violation by working with BCDC staff.

18 If the matter proceeds, this Committee should not recommend a penalty or the issuance of a
19 cease-and-desist order for the reasons below.

20 The hearing should be postponed.

21 **II. BACKGROUND**

22 **A. Mr. Greenfield’s Involvement**

23 The Complaint alleges that Mr. Greenfield is authorized by the Owner “to take all action
24 necessary to address this violation.” (Complaint at 2.) Mr. Greenfield is not a party to this
25 proceeding, but is specially appearing¹ to speak for the Owner with the goal of addressing the
26 violation by acting to encourage the sale of the property and satisfy the demands of BCDC staff.

27
28 _____
¹ Not submitting to the jurisdiction of this tribunal.

1 **B. Facts**

2 Except as specified below, Mr. Greenfield has no personal knowledge of most of the facts in
3 the Violation Report, and neither admits nor denies any of the facts asserted in that report.²

4 **III. ARGUMENTS**

5 **A. This Committee Does Not Have Jurisdiction Over The Buyer**

6 **1. The Buyer is not liable**

7 The Complaint alleges a violation of Government Code (McAteer-Petris Act) §66632(a).
8 (Complaint at 7.) That section applies as pertinent here to “Any person...wishing to place fill...”
9 (*Id.*) The Buyer here does not wish to place fill. The fill at issue has already been placed by another
10 person. Although that fill may have been placed in violation, it was not placed by the Buyer. And
11 although the Buyer might become liable for the fill *after* it purchases the property, it cannot be held
12 liable before it purchases the property. Surely the prosecution team would agree that if the Buyer
13 never purchases the property, it cannot be held liable.

14 **2. Nuisance is personal and does not run with the land**

15 The Complaint identifies as the persons believed responsible the Owner, the Buyer, and a
16 former owner. (Complaint at 2.) This allegation makes clear that liability is personal, as does
17 §666632(a), which applies to “Any person”. Because it does not run with the land, any order
18 imposed on the current owner will not automatically apply to the Buyer. Instead, BCDC will have to
19 proceed against the Buyer in a second proceeding.

20 Although liability under the McAteer-Petris Act is statutory, this type of statute is sometimes
21 interpreted as an implementation of nuisance law. A possessor of land can be held liable for
22 nuisance if several conditions are met, including the following: “he has failed *after a reasonable*
23 *opportunity* to take reasonable steps to abate the condition or to protect the affected persons against
24 it.” (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1138, emphasis added.) Here
25 the Buyer has not been given a reasonable opportunity to abate the condition at issue.
26
27

28 ² The statement of defense form provided by BCDC is attached as Exhibit 1. That form does not
offer sufficient space to include all the information needed.

1 **3. BCDC has not properly served the Complaint**

2 BCDC regulations require that a violation report and complaint be served on the persons
3 identified as liable by certified mail. (14 CCR §11321(c).) Here, the Complaint was served on a
4 real-estate agent for an unidentified “Buyer”. (Complaint at 1.) Because there is no allegation or
5 evidence that the real-estate agent was the Owner’s agent for service of process, or that the agent
6 agreed to accept service, the Buyer has not been properly served. (*See Summers v.*
7 *McClanahan* (2006) 140 Cal.App.4th 403, 413-415 (service on a defendant’s agent for other
8 purposes not enough to establish actual or implied authority to accept service of process, even if
9 their relationship makes it highly probable that defendant will receive actual notice of the lawsuit).)
10 When a defendant has not been properly served, the tribunal lacks jurisdiction over the defendant.
11 (*Id.* at 413.)

12 Process was not served on the former owner. (Complaint at 1.) The tribunal therefore does
13 not have jurisdiction over it.

14 Process appears to have been served on the Owner through a counsel for Mr. Greenfield.
15 There is neither allegation nor evidence that he was the agent for service of process for Owner nor
16 that he agreed to accept service on behalf of Owner. The tribunal therefore does not have
17 jurisdiction over the Owner.

18 **B. A Hearing Can Only Interfere With The Outcome BCDC Wants**

19 The alleged violation is the installation of a set of stairs going down a cliff from the house to
20 the beach. BCDC staff want the property remediated to a pre-violation-like condition. Postponing
21 the hearing is the best way of achieving this goal.

22 **1. An order against a bankrupt company does BCDC no good**

23 The Owner’s only asset is the property. It cannot comply with an order requiring it to spend
24 money that it does not have. If the Buyer is scared off, therefore, the Owner will not be able to
25 implement any remedial plan, or even to submit a plan to BCDC staff. An order against the Owner,
26 therefore, will not accomplish what BCDC wants to accomplish.

1 **2. If the hearing kills the deal, no one gains**

2 A property that has a solvable regulatory problem is obviously easier to sell than a property
3 encumbered by an unspecific administrative order. A rational buyer can easily be dissuaded from
4 buying a property subject to an unspecific administrative order because that rational buyer could
5 reasonably conclude that the costs of responding to the agency could be much greater than expected.

6 If BCDC's sword rattling scares off the buyer, no one gains. Here everyone gains by
7 reaching agreement on a remediation plan. BCDC gets the remediation it wants, and the Buyer gets
8 a bounded problem that it can solve at a known cost.

9 **3. The hearing should be postponed until the Buyer takes ownership and has an
10 opportunity to submit an engineering plan**

11 Under these circumstances, the hearing should be postponed so that the Buyer can take
12 ownership and have a reasonable opportunity to abate the condition at issue. (See section III.A.2
13 above.)

14 **C. Due Process Is Violated**

15 **1. Respondents have no opportunity to respond to the proposed order**

16 Due process requires that a defendant be given notice and an opportunity to respond. Here
17 the hearing process violates due process because respondents are not given an opportunity to respond
18 to the cease-and-desist order to be issued.

19 The Complaint alleges that "the Commission's staff will also recommend a cease and desist
20 order". (Complaint at 8.) The prosecution team has not provided respondents with a draft of the
21 order that is being requested. That will come at a later date. But since respondents are prohibited
22 from offering additional evidence or written argument after the statement of defense, respondents
23 will have no opportunity to respond to the proposed cease-and-desist order. That violates due
24 process.

25 **2. BCDC regulations prevent effective cross-examination**

26 BCDC regulations require respondents to identify not just the person to be cross-examined,
27 but also "a specific reference to the fact or information respondent disputes, the information that
28 respondent believes can be elicited by cross-examination, and the reasons the respondent believes
 that the information can best be provided by cross-examination rather than by the submittal of

1 declarations or other written evidence”. (14 CCR § 11322(b).) This regulation prevents respondents
2 from using cross-examination effectively. Because the witness knows what questions are coming,
3 the witness can prepare beforehand.

4 This regulation is inconsistent with Evidence Code § 769, which specifies that “In examining
5 a witness concerning a statement or other conduct by him that is inconsistent with any part of his
6 testimony at the hearing, it is not necessary to disclose to him any information concerning the
7 statement or other conduct.”

8 This regulation is also inconsistent with case law holding that cross-examiners should be
9 given wide latitude: “While the trial judge has broad discretion to control the ultimate scope of
10 cross-examination designed to test the credibility or recollection of a witness, yet wherever possible
11 that examination should be given wide latitude...” (*Jennings v. Superior Court of Contra Costa*
12 *County* (1967) 66 Cal.2d 867, 877, citations and quotation marks omitted.)

13 The BCDC regulation on cross-examination, and its application here, violate due process.

14 **3. Respondents have not had sufficient time to prepare**

15 Mr. Greenfield previously submitted to the prosecution team a technical report dated in
16 November 2021 and signed by Lou M. Gilpin, Ph.D., Engineering Geologist, of Gilpin Geosciences,
17 and by Craig S. Shields, Geotechnical Engineer, of Rockridge Geotechnical. (Declaration of
18 Raphael Montes, Ex. A.) This report concludes that the stairway should remain in place:

19 The concrete structures installed prior to our 1938 aerial photograph and the
20 subsequent improvements built on the older structures in 2003 have improved
21 the stability of the bluff. Any attempt to remove these structures would have
22 significant and possibly catastrophic effects on the site vicinity bluff stability.
The primary geologic and geotechnical concern is rockfall and erosion of the
bluff and overlying dune sand.

(*Id.* at 5.)³

23 Mr. Greenfield also provided a report entitled Structural Assessment Report, 224 Sea Cliff,
24 Structural Assessment of Rear Stairs, dated in December 2021 and signed by Adam Azofeifa, S.E.,
25

26 ³ Dr. Gilpin is a former member of BCDC’s Engineering Criteria Review Board. The Board “is
27 made up of ten eminent professionals, including structural, coastal, and geotechnical engineers, a
geologist, a geophysicist and an architect.” ([https://bcdca.gov/permits/ecrbmembers.html](https://bcdca.gov/permits/ecrbmembers.html#:~:text=The%20Engineering%20Criteria%20Review%20Board,projects%20that%20require%20BCDC's%20permits.)
28 <http://www.gilpingeosciences.com/Staff.html>.) His website refers to his statements of qualifications.

1 Senior Engineer, and Denny Kwan, Principal, of Holmes Structures.⁴ (Declaration of Raphael
2 Montes, Ex. B.) That report did not recommend any major retrofit:

3 While some minor damage and deterioration was observed as noted above,
4 overall the rear access stair structure at 224 Sea Cliff Avenue appears to be
5 performing well, so while some localized repairs are warranted as described in
6 Section 8, we are not recommending any major retrofit or strengthening at this
7 time.

8 The prosecution team's expert, Mr. Montes, disagreed with these four professionals:

9 Statements in Exhibit A and Exhibit B that suggest significant effects on cliff
10 stability if the rear stair structure is removed are not supported by adequate
11 evidence.

12 (Declaration of Raphael Montes at 3.) The word "evidence" here cannot have been intended in the
13 legal sense, which would include testimony, because the reports contain many pages of testimony.
14 What Mr. Montes must have meant by "evidence" is *engineering* evidence—in other words, data.
15 But the time to respond to the Complaint is not sufficient to collect any data. The time to respond is
16 therefore insufficient to respond to the opinion of BCDC's expert, which the Committee may defer
17 to.

18 Moreover, Mr. Montes calls for an "engineering design":

19 Removal of the additions placed between 2002-2004 should not be done
20 haphazardly, but when done pursuant to an engineering design by a
21 geotechnical and structural engineer will not negatively affect the integrity or
22 the stability of the 1938 structures or the cliff itself.

23 (Declaration of Mr. Montes at 3.) The time to respond is also insufficient to prepare an engineering
24 design. Because the short time to respond does not in this case allow respondents to obtain expert
25 opinions sufficient to overcome the opinion of BCDC's expert, due process has been violated.

26 **4. The proposed order violates the separation-of-functions rule**

27 Due process requires agencies to separate advocates from decision makers, and prohibits ex
28 parte communications between them:

While the state's administrative agencies have considerable leeway in how they structure
their adjudicatory functions, they may not disregard certain basic precepts. One fairness
principle directs that in adjudicative matters, one adversary should not be permitted to bend
the ear of the ultimate decision maker or the decision maker's advisers in private. Another
directs that the functions of prosecution and adjudication be kept separate, carried out by
distinct individuals.

⁴ Holmes is a large structural engineering company. Exhibit 3 and holmes.us website.

1 (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40
2 Cal.4th 1, 5.)

3 The State Board Water Resources Control Board imposes a strict separation between the
4 members of the prosecution and advisory teams:

5 The hearing officer and the other [State] Board members treat the enforcement team “like
6 any other party.” Agency employees assigned to the enforcement team are screened from
7 inappropriate contact with Board members and other agency staff through strict application
8 of the state Administrative Procedure Act’s rules governing ex parte communications. (Gov.
9 Code, § 11430.10 et seq.) “In addition, there is a physical separation of offices, support staff,
computers, printers, telephones, facsimile machines, copying machines, and rest rooms
between the hearing officer and the enforcement team (as well as the hearing team),”
according to the Whitney declaration.

10 (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731,
11 735-736.)

12 Here the Complaint calls for respondents to submit a plan “for BCDC review” and to “revise
13 the plan pursuant to BCDC direction”. (Complaint at 8.) That would give decision-making
14 authority to the *prosecution team*, which in this case includes the Executive Director and all BCDC
15 staff. But the prosecution team is inherently biased, and to avoid violating due process all decisions
16 on this matter must be made by the decision-making members of the Committee, the Commission,
17 and their advisory teams.

18 **5. Respondents cannot comply with the proposed order**

19 The Complaint calls for a cease-and-desist order that would require respondents to “prepare a
20 plan to remove all fill placed on public property and restore the site as much as possible to its initial
21 condition”. (Complaint at 8.) This plan would be reviewed and revised as directed by the
22 prosecution team. (*Id.*) But the proposed order calls for respondents to do what they cannot do,
23 i.e. pay money that they do not have.

24 Although injunctions generally can be enforced through contempt proceedings, a court does
25 not have jurisdiction to hold a person in contempt when that person is unable to comply:

26 The facts essential to jurisdiction for a contempt proceeding are (1) the
27 making of the order; (2) knowledge of the order; (3) ability of the
28 respondent to render compliance; (4) willful disobedience of the order.

(*Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, 1736, quoting *In re Liu*,
(1969) 273 Cal.App.2d 135, 140-141, quotation marks omitted.) An injunction that cannot be

1 enforced should not be issued. (See Civil Code § 3532 (“[t]he law neither does nor requires idle
2 acts”).) A court must always consider the consequences of the requested relief. (*Dawson v. East*
3 *Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1040 (“[y]ears ago the U.S. Supreme
4 Court pointed out that “[i]t is always the duty of a court of equity to strike a proper balance between
5 the needs of the plaintiff and the consequences of giving the desired relief”), quoting *Eccles v.*
6 *Peoples Bank* (1948) 333 U.S. 426, 431.)

7 Ordering a person to do something beyond that person’s ability would violate due process.
8 The United States Supreme Court has repeatedly held that a person may not be punished for being
9 unable to comply with a court order:

10 Our precedents are clear, however, that punishment may not be imposed in a
11 civil contempt proceeding when it is clearly established that the alleged
 contemnor is unable to comply with the terms of the order.

12 (*Hicks on Behalf of Feiock v. Feiock* (1988) 485 U.S. 624, 638 , citing inter alia *United States v.*
13 *Rylander* (1983) 460 U.S. 752, 757 .) *Rylander* makes clear that a court must not proceed when a
14 court order requires something that is “factually impossible”:

15 [A court] will not be blind to evidence that compliance is now factually
16 impossible. Where compliance is impossible, neither the moving party nor
 the court has any reason to proceed with the civil contempt action.

17 (*Rylander* at 757.)

18 Here the proposed order would require the Owner to spend money hiring consultants,
19 submitting an engineering plan, revising that plan as required by the prosecution team, and
20 implementing that plan. But the Owner has no assets other than the property. As long as the
21 property remains unsold, the Owner cannot comply with the proposed order.

22 **6. There is insufficient time for trial**

23 The hearing before the Committee in this case is the equivalent of a trial. Due process
24 requires that a respondent obtain a fair trial, and a fair trial requires that respondents be given
25 sufficient time to make their case. Here respondents request 2-3 hours to make their argument,
26 cross-examine the opposing expert, and put on their rebuttal experts. If that request is not granted,
27 then respondents will not have sufficient time for trial.
28

1 **D. The Proposed Remedy Is Too Vague**

2 A cease-and-desist order is a type of injunction relief. Here the order as currently proposed
3 (Complaint at 8) does not comply with the requirements for injunctive relief.

4 An injunction must be narrowly drawn to give the party enjoined reasonable notice of what
5 conduct is prohibited. (*Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal.App.4th 950, 979, citing
6 *Schmidt v. Lessard* (1974) 414 U.S. 473, 476.) Unless an injunction is narrowly drawn, it cannot be
7 enforced:

8 A most basic premise in the law of contempt is that such punishment
9 can only rest upon clear, intentional violation of a specific, narrowly
10 drawn order. Specificity is an essential prerequisite of a contempt
11 citation.

12 (*Wilson v. Superior Court* (1987) 194 Cal.App.3d 1259, 1272–1273, citing inter alia
13 *In re Coleman* (1974) 12 Cal.3d 568, 572.) A contempt citation may not rest “on an order which
14 incorporates by reference the entire history of a complicated lawsuit.” (*Id.* at 1272.)

15 Here the proposed order is too vague to comply with the law applicable to injunctive relief.

16 **E. The Opinion Of The Prosecution Team’s Witness Should Be Excluded**

17 An expert’s opinion must be based on reliable matter, and cannot be based on speculation or
18 conjecture:

19 An expert opinion has no value if its basis is unsound. ... Evidence Code
20 section 801, subdivision (b), states that a court must determine whether the
21 matter that the expert relies on is of a type that an expert reasonably can rely
22 on ‘in forming an opinion *upon the subject to which his testimony relates.*’
23 (Italics added.) We construe this to mean that the matter relied on must
24 provide a reasonable basis for the particular opinion offered, and that an
25 expert opinion based on speculation or conjecture is inadmissible.

26 (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770, references
27 to citations and quotation marks omitted.) An expert’s report cannot be “purely conclusory” or
28 based on assumptions “without evidentiary support”, and must include a “reasoned explanation”:

 For example, an expert's opinion based on assumptions of fact without
evidentiary support, or on speculative or conjectural factors, has no
evidentiary value and may be excluded from evidence. Similarly, when an
expert's opinion is purely conclusory because unaccompanied by a reasoned
explanation connecting the factual predicates to the ultimate conclusion, that
opinion has no evidentiary value because an expert opinion is worth no more
than the reasons upon which it rests.

1 (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117, citations
2 and quotation marks omitted.)

3 Here the prosecution team's expert has provided a "purely conclusory" opinion that is based
4 on assumptions "without evidentiary support", and does not include a "reasoned explanation". He
5 concludes that "Nearly all of the structures, including the handrails and landings of the rear stairs,
6 constructed between 2002-2004 may be removed without affecting cliff stability." (Declaration of
7 Mr. Montes at 3.) This conclusion is based on...nothing. It is not supported by any engineering
8 evidence or other evidence. It does not include a reasoned explanation. It is therefore a "purely
9 conclusory" opinion that is not admissible.

10 Mr. Montes is aware that the four experts who submitted two reports reached a different
11 conclusion: "Statements in Exhibit A and Exhibit B that suggest significant effects on cliff stability
12 if the rear stair structure is removed are not supported by adequate evidence." (*Id.*) Having
13 criticized these experts for not providing "adequate evidence", Mr. Montes must have been aware
14 that he had an obligation of his own to provide adequate evidence. And yet he provides no evidence
15 at all.

16 Mr. Montes may be acting in his usual role, where he is the BCDC decision-maker who
17 reviews the engineering reports of applicants and who rejects them if he is not persuaded. But here
18 he is not the decision-maker. He is one side's expert who should be treated like any other expert.
19 Having called out the need for "adequate evidence", and then provided none. Mr. Montes has failed
20 his own test—as well as the test of Evidence Code § 801 and *Sargon*.

21 Nor should there be any dispute that the balance strongly tips against Mr. Montes. The two
22 reports he criticized were submitted by four experts, who have far better credentials and vastly
23 greater experience than Mr. Montes. Dr. Gilpin, the first author on the first report, is a former
24 member of the BCDC Engineering Criteria Review Board, and therefore confirmed by BCDC as an
25 "eminent" authority. (Footnote 3 above.) He is a Ph.D. engineering geologist, whereas Mr. Montes
26 does not even have a masters. As shown by his statement of qualifications, the great majority of Mr.
27 Montes' experience is as a bridge engineer for CalTrans, specifically an Area Bridge Maintenance
28 Engineer and a Senior Bridge Engineer. (Declaration of Mr. Montes at 2.) Needless to say, this case

1 is not about bridges. Mr. Montes has identified only one case in which he worked on cliff stability,
2 and his declaration does not specify exactly what his job responsibilities were on that project. He
3 does admit, however, that he did not do the geotechnical engineer work; rather, his “assignment
4 involved [] coordination with Caltrans division of geotechnical engineering”. (*Id.*) Mr. Montes
5 therefore has not established that he has the special expertise needed for an expert opinion.

6 His expert report is inadmissible and should be excluded.

7 **F. The Penalty Is Barred By Laches And The One-Year Statute Of Limitations**

8 Laches can be proved against an administrative agency in two ways:

9 [T]he elements of unreasonable delay and resulting prejudice may be “met” in
10 two ways. First, they may be demonstrated by the evidence in the case, and
11 the person arguing in favor of a finding of laches has the burden of proof on
12 the laches issue. Second, the element of prejudice may be “presumed” if there
13 exists a statute of limitations which is sufficiently analogous to the facts of the
14 case, and the period of such statute of limitations has been exceeded by the
15 public administrative agency in making its claim. In the second situation, the
16 limitations period is “borrowed” from the analogous statute, and the burden of
17 proof shifts to the administrative agency. To defeat a finding
18 of laches the agency, here the Department, must then (1) show that the delay
19 involved in the case...was excusable, and (2) rebut the presumption that such
20 delay resulted in prejudice to the opposing party.”

21 (*Fountain Valley Regional Hospital & Medical Center v. Bonta* (1999) 75 Cal.App.4th 316, 323–
22 324.)

23 Here, the most analogous statutes of limitations are the one-year statute in Code of Civil
24 Procedure (“CCP”) sections 340(a) and 340(b), which apply to an action upon a statute for a penalty
25 and to an action upon a statute for a penalty to the people of this state, respectively. Other statutes of
26 limitation that might be analogous here are the three-year statute in CCP section 338(a) that applies
27 to a liability created by statute, the three-year statute in CCP section 338(b) that applies to “An
28 action for trespass upon or injury to real property” including nuisance, and the four-year statute in
CCP section 343 that applies to “An action for relief not hereinbefore provided for”. CCP section
345 specifies that “The limitations prescribed in this chapter apply to actions brought in the name of
the state or county or for the benefit of the state or county, in the same manner as to actions by
private parties.”

Here the Complaint fails any of these tests. The violations “began in 2002”. (Complaint at
4.) BCDC “opened its own enforcement action against the project in 2004.” (*Id.* at 5.) The alleged

1 violation therefore occurred *twenty years* ago, and this enforcement matter has been pending for
2 eighteen years. The Complaint makes no allegation, much less provides evidence, that would carry
3 the prosecution team's burden of showing that the penalties are not barred.⁵

4 **G. The Report Overcounts The Alleged Violations**

5 Section 66641.5(e) of the McAteer-Petris Act limits administrative penalties to a \$30,000 per
6 violation:

7 Civil liability may be administrative imposed...in an amount...[not] more
8 than two thousand dollars (\$2,000), for each day in which that violation
9 occurs or persists, but the commission may not administratively impose a fine
of more than thirty thousand dollars (\$30,000) for a single violation.

10 Here there has been a "single violation": the installation of the stairway down the cliff. The
11 Complaint counts this one violation as three by dividing the single violation into the placement of fill
12 within "private property within BCDC's Shoreline Band jurisdiction", "public property within
13 BCDC's Shoreline Band jurisdiction", and "public property within BCDC's Bay jurisdiction".
14 (Complaint at 8.) But the statute being violated, section 66632(a), does not make any distinction
15 between private or public property or between Shoreline Band and Bay jurisdiction. The statute
16 applies to "Any person or governmental agency wishing to place fill...within the area of the
17 commission's jurisdiction". (Complaint at 7.) Because all three alleged violations were "within the
18 area of the commission's jurisdiction", they were all the same "single violation".

19 The prosecution team has therefore overcounted the number of violations.

20 **H. BCDC's Penalty Procedures Are Unconstitutional**

21 When a government official imposes penalties that go to fund that government agency, it
22 creates a "situation in which an official perforce occupies two practically and seriously inconsistent
23 positions, one partisan and the other judicial, and *necessarily involves a lack of due process* of law in
24 the trial of defendants charged with crimes before him". (*Ward v. Village of Monroeville*,
25 *Ohio* (1972) 409 U.S. 57, 60, emphasis added, quotation marks and parentheses omitted.) BCDC is
26
27

28 ⁵ If the prosecution team tries to make this showing in its reply brief, respondents should be given an opportunity to respond.

1 in exactly this position. The commission imposes penalties that go to BCDC, thereby giving the
2 commissioners an unconstitutional pecuniary interest in the outcome.

3 Penalties imposed by BCDC go into the Bay Fill Clean-up and Abatement Fund, and “all
4 moneys paid into the fund shall be available for expenditure by the commission or the executive
5 director, when appropriated by the Legislature”. (Government Code section 66647(a)-(b).)

6 BCDC’s penalty procedures therefore violate due process.

7 **IV. CROSS EXAMINATION AND EXPERT REBUTTAL**

8 The key factual issue in this hearing is whether the staircase can be removed without causing
9 structural risks. The experts have expressed directly contrary opinions on paper, but have not been
10 subject to deposition or cross-examination. This case therefore calls for cross-examination of the
11 prosecution team’s expert, and rebuttal testimony by the experts with the contrary opinion. The
12 following information is provided in accordance with 14 CCR § 11322.

13 Name of each person the respondent wants to cross examine: (1) Mr. Montes (cross-
14 examination), (2) Dr. Gilpin (rebuttal), and (3) Mr. Shields (rebuttal).

15 All documents about which about which the respondent wants to cross examine: The
16 declaration submitted by Mr. Montes, including its exhibits.

17 A description of the area of knowledge about which the respondent wants to cross-examine
18 the person, including a specific reference to the fact or information respondent disputes: The
19 following statements in Mr. Montes’ declaration:

20 Nearly all of the structures, including the handrails and landings of the rear
21 stairs, constructed between 2002-2004 may be removed without affecting cliff
22 stability. This includes any part of the rear stairs painted pink, and the entire
23 landing of the structure that comes into contact with BCDC Bay jurisdiction.
24 Statements in Exhibit A and Exhibit B that suggest significant effects on cliff
25 stability if the rear stair structure is removed are not supported by adequate
26 evidence. I agree that the structures that were in place in 1938 cannot be
27 removed without concerns about cliff stability. These structures are not being
28 proposed for removal. The structures added between 2002-2004 do not add
significant stability to the cliff, and in fact are potentially overloading the pre-
existing retaining walls and structures at the site. Removal of the additions
placed between 2002-2004 should not be done haphazardly, but when done
pursuant to an engineering design by a geotechnical and structural engineer
will not negatively affect the integrity or the stability of the 1938 structures or
the cliff itself.

1 The information that respondent believes can be elicited by cross-examination, and the
2 reasons the respondent believes that the information can best be provided by cross-examination
3 rather than by the submittal of declarations or other written evidence: Mr. Montes has provided
4 purely conclusory opinions without any reasoned explanation. (Section III.E above.) If the
5 Committee does not exclude this testimony, as it should, then respondents are entitled to inquire into
6 the basis for his opinions. Respondents are also entitled to ascertain exactly which structures in his
7 opinion should be removed and which can remain. This information cannot be obtained by
8 declaration because Mr. Montes is the prosecution team's witness. Since Mr. Montes did not
9 provide any reasoned explanation for his opinions, there is no explanation for respondents to counter
10 through declarations. Rebuttal testimony is therefore needed so that respondents can receive due
11 process, including notice of the basis of Mr. Montes' opinions and an opportunity to respond to
12 them.

13 **V. REQUEST FOR STATEMENT OF DECISION**

14 The prosecution team is asking the Committee to rule on the key factual issue based only a
15 declaration that does not provide a reasoned explanation for its opinions. If the Committee
16 nevertheless decides to rule in favor of the prosecution team on this issue, respondents are entitled to
17 a statement of decision that clearly explains why the Committee is deciding this factual issue in
18 favor of the prosecution team, and exactly what parts of the stairway the Committee has decided
19 should be removed.
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VI. CONCLUSION

The hearing should be postponed. If it is not postponed, the Committee should rule against the prosecution team and recommend that there be no penalty and no cease-and-desist order.⁶

DATED: May 6, 2022

BRISCOE IVESTER & BAZEL LLP



By: _____
Lawrence Bazel
Attorneys for Specially Appearing Non-Party
Paul Greenfield

⁶ Counsel for the prosecution team has agreed that this statement of defense may be submitted to BCDC by e-mailing it to him.

EXHIBIT 1

Statement of Defense Form

Enforcement Case ER2004.019.00

PSG CAPITAL PARTNERS INC.; PHILIP FUSCO; PSG MORTGAGE LENDING CORP.; “BUYER”

FAILURE (1) TO COMPLETE THIS FORM, (2) TO INCLUDE WITH THE COMPLETED FORM ALL DOCUMENTS, DECLARATIONS UNDER PENALTY OF PERJURY, AND OTHER EVIDENCE YOU WANT PLACED IN THE RECORD AND TO BE CONSIDERED BY THE COMMISSION, (3) TO LIST ANY WITNESSES WHOSE DECLARATION IS PART OF THE STAFF'S CASE AS IDENTIFIED IN THE VIOLATION REPORT THAT YOU WISH TO CROSS-EXAMINE, THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE WITNESS, AND THE INFORMATION YOU HOPE TO ELICIT BY CROSS-EXAMINATION, AND (4) TO RETURN THE COMPLETED FORM AND ALL INCLUDED MATERIALS TO THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION STAFF OR TO CONTACT **MATTHEW TRUJILLO** OR **BRENT PLATER** OF THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF BY **MAY 6, 2022** MEANS THAT THE COMMISSION CAN REFUSE TO CONSIDER SUCH STATEMENTS AND EVIDENCE WHEN THE COMMISSION HEARS THIS MATTER.

DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU, IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BE USED AGAINST YOU.

YOU MAY WISH TO CONSULT WITH OR RETAIN AN ATTORNEY BEFORE YOU COMPLETE THIS FORM OR OTHERWISE CONTACT THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF.

This form is enclosed with a violation report. The violation report indicates that you may be responsible for or in some way involved in either a violation of the Commission's laws, a Commission permit, or a Commission cease and desist order. The violation report summarizes what the possible violation involves, who may be responsible for it, where and when it occurred, if the Commission staff is proposing any civil penalty and, if so, how much, and other pertinent information concerning the possible violation.

This form requires you to respond to the alleged facts contained in the violation report, to raise any affirmative defenses that you believe apply, to request any cross-examination that you believe necessary, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the possible violation or may mitigate your responsibility. This form also requires you to enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps drawings, etc. and written declarations under penalty of perjury that you want the Commission to consider as part of this enforcement hearing. This form also requires you to identify by name any person whom you may want to cross-examine prior to the enforcement hearing on this matter, the area of knowledge that you want to cover in the cross-examination, the nature of the testimony that you hope to elicit, and the reasons that you believe other means of producing this evidence are unsatisfactory. Finally, if the staff is only proposing a civil penalty, i.e., no issuance of either a cease or desist order or a permit revocation order, this form allows you alternatively to pay the proposed fine without contesting the matter subject to ratification of the amount by the Commission.

IF YOU WANT TO CROSS-EXAMINE ANY PERSON ON WHOSE TESTIMONY THE STAFF HAS RELIED IN THE VIOLATION REPORT, YOU MUST COMPLETE PARAGRAPH SEVEN TO THIS STATEMENT OF DEFENSE FORM. THIS PARAGRAPH REQUIRES YOU TO SET OUT (1) THE NAME(S) OF THE PERSON(S) YOU WANT TO CROSS-EXAMINE, (2) REFERENCES TO ANY DOCUMENTS ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (3) THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (4) THE INFORMATION THAT YOU BELIEVE CAN BE ELICITED BY CROSS-EXAMINATION, AND (5) THE REASON WHY YOU BELIEVE THIS INFORMATION CANNOT BE PRESENTED BY DECLARATION OR OTHER DOCUMENT.

You should complete the form as fully and accurately as you can as quickly as you can and return it no later than 35 days after its having been mailed to you to the Commission's enforcement staff at the address:

**San Francisco Bay Conservation and Development Commission
375 Beale Street, Suite 510
San Francisco, California 94105**

The forms should also be emailed to Margie Malan at margie.malan@bcdc.ca.gov.

If you believe that you have good cause for not being able to complete this form within 35 days of its having been mailed, please complete it to the extent that you can and within 35 days of the mailing of the violation report send the statement of defense form completed as much as possible with a written explanation of what additional information you need to complete the form in its entirety, how long it will take to obtain the additional information needed to complete the form, and why it will take longer than 35 days to obtain the additional information, send all of this to the Commission's staff at the above address. Following this procedure does not mean that the Executive Director will automatically allow you to take the additional time to complete the form. Only if the Executive Director determines that you have shown good cause for the delay and have otherwise complete the form as much as is currently possible will be grant an extension to complete the form.

If the staff violation report that accompanied this statement of defense form included a proposed civil penalty, you may, if you wish, resolve the civil penalty aspect of the alleged violation by simply providing to the staff a certified cashier's check in the amount of the proposed fine within the 35-day time period. If you choose to follow this alternative, the Executive Director will cash your check and place a brief summary of the violation and proposed penalty along with a notation that you are choosing to pay the penalty rather than contesting it on an administrative permit listing. If no Commissioner objects to the amount of the penalty, your payment will resolve the civil penalty portion of the alleged violation. If a Commissioner objects to the proposed payment of the penalty, the Commission shall determine by a majority of those present and voting whether to let the proposed penalty stand. If such a majority votes to let the proposed penalty stand, your payment will resolve the civil penalty portion of the alleged violation. If such a majority does not let the proposed penalty stand, the Commission shall direct the staff to return the money paid to you and shall direct you to file your completed statement of defense form and all supporting documents within 35 days of the Commission's action. Of course, you also have the opportunity of contesting the fine from the outset by completing this form and filing it and all supporting documents within 35 days of its having been mailed to you.

If you have any questions, please contact as soon as possible **MATTHEW TRUJILLO** or **BRENT PLATER** of the Commission Enforcement Staff at telephone number **415-352-3633** or **415-352-3628**.

1. Facts or allegations contained in the violation report that you admit (with specific reference to the paragraph number in the violation report):

2. Facts or allegations contained in the violation report that you deny (with specific reference to paragraph number in the violation report):

3. Facts or allegations contained in the violation report of which you have no personal knowledge (with specific reference to paragraph number in the violation report):

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any documents, photographs, maps, letters, or other evidence that you believe are relevant, please identify it by name, date, type, and any other identifying information and provide the original or a copy if you can):

5. Any other information, statement, etc. that you want to make:

6. Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to this statement to support your answers or that you want to be made part of the administrative record for this enforcement proceeding (Please list in chronological order by date, author, title and enclose a copy with this completed form):

7. Name of any person whose declaration under penalty of perjury was listed in the violation report as being part of the staff's case who the respondent wants to cross-examine, all documents about which you want to cross-examine the person, area or areas of information about which the respondent wants to cross-examine the witness, information that the respondent hopes to elicit in cross-examination, and the reason(s) why some other method of proving this information is unsatisfactory:

EXHIBIT 2



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About Us

Established in 2006, Rockridge Geotechnical is a certified Small Business in the State of California, a Small Local Emerging Business in the County of Alameda, as well as a Small Local Business Enterprise in the City of Oakland. With over 70 years of total combined experience in the geotechnical engineering field, Rockridge Geotechnical engineers are knowledgeable, professional, and experts in their field. 2016 marked the 10 year anniversary of this successful small business, and with a growing team and growing client base we are excited for the next 10 years to come.



Craig S. Shields, P.E., G.E., Mr. Shields is the founder and a Principal Engineer of Rockridge Geotechnical. He received a Bachelor of Science degree in Civil Engineering from the University of California, Berkeley in 1981 and a Master of Science in Geotechnical Engineering from the University of California, Berkeley in 1982.

Mr. Shields has over 38 years of geotechnical engineering experience in Northern California for a variety of private and public projects. He has managed geotechnical engineering projects for low-rise buildings to high-rise towers, market-rate and affordable housing developments, as well as mixed-use, retail, commercial, and office developments. He has also performed geotechnical services for waterfront and harbor facilities, airports, light railways, slope repairs, quarry reclamation, municipal and regional parks, public and private schools, and institutional and public buildings.

Mr. Shields has developed design recommendations for deep and shallow foundations, ground improvement systems, deep excavations, slope stabilization, underpinning of existing structures, and temporary shoring and permanent retaining walls. He has performed forensic investigations, provided expert witness testimony, and performed peer reviews for numerous projects. He is instrumental in developing geotechnical recommendations that balance cost with performance and risk to the varying subsurface and project performance criteria.



Linda H.J. Liang, P.E., G.E., Ms. Liang is an Associate Engineer of Rockridge Geotechnical. She received a Bachelor of Science degree in Civil Engineering from the University of California, Berkeley in 1997 and a Master of Science degree in Geotechnical Engineering from the University of California, Berkeley in 1998.

Ms. Liang has over 20 years of experience leading and coordinating complex field investigations, developing geotechnical recommendations, and collaborating with design and construction team members and stakeholders from conceptual design through project completion. She has provided geotechnical services for both public and private sector clients throughout the greater San Francisco Bay Area, nationally and internationally. Her project experience included market-rate and affordable housing developments, public and private schools, commercial and office developments, park and sport facilities, public and institutional buildings, shoreline and waterfront structures, slope stabilization and landslide repairs. She had also provided geotechnical services for infrastructure projects, such as new roadways, parking structures, pipelines, levees, dams, and water treatment plants.

Ms. Liang has managed a diverse range of projects from single-story buildings to high-rise towers with multi-level basements; landfill closures and post-closure land use; preparing and reviewing

Environmental Impact Reports; emergency response and repair of slope failures; and site development. She has designed and evaluated engineered slopes, landfill cover systems, shallow and deep foundations, ground improvement systems, underpinning, temporary shoring and permanent retaining walls. She applies her breadth of geotechnical knowledge and diverse project experience to develop project solutions that are technically sound, cost effective, and constructable.

Logan D. Medeiros, P.E., G.E., Mr. Medeiros is a Senior Engineer of Rockridge Geotechnical. He received a Bachelor of Science degree in Civil Engineering from California Polytechnic State University, San Luis Obispo in 2004, and a Master of Science degree in GeoEngineering from the University of California, Berkeley in 2007.

Mr. Medeiros has over 15 years of geotechnical engineering experience and provided project management, subsurface investigation, engineering design, and construction observation services for numerous projects throughout the greater San Francisco Bay Area and nationally. He has evaluated sites with complex subsurface conditions, such as soft soils, liquefiable soils, and unstable slopes. He has worked on projects for educational facilities, commercial developers, affordable and market-rate residential developers, government agencies, and litigation support.

Mr. Medeiros has developed design recommendations for slope stabilization, ground improvement systems, deep excavations, deep and shallow foundations, and temporary shoring and retaining walls. He has performed geologic hazard evaluations, site-specific ground motion studies, and site response analyses for liquefiable sites, as well as for public school projects successfully reviewed by the California Division of State Architect (DSA) and the California Geological Survey (CGS). His integrated expertise provides insights that help clients make informed decisions early in a project lifecycle.



Darcie A. Maffioli, P.E., G.E., Ms. Maffioli is a Senior Project Engineer of Rockridge Geotechnical. She received a Bachelor of Science degree in Civil Engineering from California Polytechnic State University, San Luis Obispo in 2008, and a Master of Science degree in Civil Engineering from the University of California, Los Angeles in 2010.

Ms. Maffioli has provided project management, geotechnical investigation, and construction observation services for a variety of projects throughout Northern California. She has performed geotechnical investigations and studies to develop geotechnical recommendations for the design and construction of low-rise to high-rise residential and commercial developments, educational facilities, and affordable housing projects. She has provided geotechnical recommendations to mitigate geologic hazards such as liquefaction, lateral spreading, and unstable slopes. She has also participated in design optimization projects, feasibility studies, litigation, and peer reviews for complex geotechnical projects.

Her building experience includes developing geotechnical recommendations for the design and construction of new and retrofit structures and facilities. Her levee and dam experience includes performing assessments of geotechnical hazards, slope stability, seepage, and preparing reports reviewable by State and Federal agencies.

Ms. Maffioli has evaluated sites with complex subsurface conditions, including undocumented fill, weak and highly compressible soils, and potentially liquefiable soils. She has developed design recommendations for deep and shallow foundations, temporary shoring and retaining walls, and ground improvement systems. She has performed site-specific ground motion studies and site response analyses. She has also installed and assessed the performance of subsurface instrumentation such as inclinometers, extensometers, and piezometers.



Clayton J. Proto, P.E., Mr. Proto is a Senior Project Engineer of Rockridge Geotechnical. He received a Bachelor of Science degree in Civil Engineering from California Polytechnic State University, San Luis Obispo in 2011, and a Master of Science degree in Civil Engineering from the University of California, Davis in 2013.

Mr. Proto has provided construction observation, engineering analysis, project management, and geotechnical investigation services for a wide range of projects across the greater San Francisco Bay Area. He routinely coordinates geotechnical field investigations and excels at keeping projects on-budget and on-schedule. He has evaluated sites with complex subsurface conditions, such as sites with weak and highly compressible soils, liquefiable soils, lateral spreading, and unstable slopes. He has collaborated with teams for new construction projects, including waterfront developments, retail and commercial developments, office developments, and both affordable and market-rate residential developments, as well as seismic upgrade of existing structures for residential and commercial use. He has also evaluated foundation systems, assessed settlements, and performed site-specific ground motion studies for tall buildings (high-rise towers that are at least 40 stories).

Mr. Proto has performed extensive geotechnical engineering analyses, including detailed settlement assessments, static and dynamic slope stability, and selecting geotechnical parameters for the design of ground improvement systems, deep excavations, deep and shallow foundations, and temporary shoring and retaining walls. He has performed geologic hazard evaluations, site-specific ground motion studies, and site response analyses for sites susceptible to soil liquefaction.

Katie Dickinson, Ms. Dickinson is a Project Engineer and Field Operations Manager of Rockridge Geotechnical, Inc. She received a Bachelor of Science degree in Geological Engineering from the University of Nevada, Reno in 2012.



Ms. Dickinson has directed geotechnical field investigations, provided geotechnical observation and testing services during construction, and managed geotechnical investigation and construction projects throughout the greater San Francisco Bay Area. As a Field Operations Manager, Ms. Dickinson has also trained field staff(s) to successfully perform geotechnical investigations and provide construction observations and testing services. She has supervised the firms' field engineers and technicians and assigns the appropriate field staff(s) to provide construction observation and testing services.

Ms. Dickinson has provided construction services for a wide range of projects, including site grading and fill placement; mass grading with thick fill slopes and keyways; installation of shallow foundations and deep foundations, such as drilled piers and driven steel and concrete piles; micropiles and helical mini-piles; proprietary deep foundations such as auger-cast-piles and torque-down piles; ground improvement systems such as permeation grouting, compaction grouting, and drilled-displacement sand-cement columns; temporary shoring and permanent retaining walls, including installation of tiebacks and soil nails.



Quintin A. Flores, P.E., Mr. Flores is a Project Engineer for Rockridge Geotechnical. He received a Bachelor of Science degree in Civil Engineering from California Polytechnic State University, San Luis Obispo in 2015, and a Master of Science degree in GeoEngineering from the University of California, Berkeley in 2016.

Mr. Flores has provided construction observation, engineering analysis, project management, and geotechnical investigation services for a wide range of projects across the greater San Francisco Bay Area. He has performed geotechnical studies and investigations to develop geotechnical recommendations for the design and construction of low-rise to high-rise residential and commercial development. He has worked on projects for commercial developers, affordable and market-rate residential developments, and projects with deep excavations.

Mr. Flores has designed and prepared design submittals for drilled displacement sand-cement column ground improvement systems to mitigate the effects of weak, highly compressible or potentially liquefiable soils on proposed developments, and performed geotechnical engineering analyses for ground settlement, shallow and deep foundation design capacities, shoring design, and retaining wall designs. He also has extensive experience in geotechnical construction observations, including site grading and fill placement, installation of shallow and deep foundations, installation of proprietary

deep foundations, ground improvements, and installation of temporary shoring, including tiebacks and soil nails.



Devin E. Landkamer, Ms. Landkamer is a Project Engineer of Rockridge Geotechnical. She received a Bachelor of Science degree in Civil Engineering with a minor in Psychology from California Polytechnic State University, San Luis Obispo in 2015.

Ms. Landkamer has provided construction observation, engineering analysis, project management, and geotechnical investigation services for a wide range of projects across the greater San Francisco Bay Area. She has performed geotechnical studies and investigations to develop geotechnical recommendations for the design and construction of low-rise to high-rise residential and mixed-use developments, public and private schools, office development, multi-level basements, sports facilities, parking structures, and affordable housing projects.

Ms. Landkamer has performed geotechnical engineering analyses for the design and construction of shallow foundations, deep foundations, and temporary shoring. She also has extensive experience in geotechnical construction observations, including site grading, fill placement, and utility trench backfill. She has observed the installation of shallow foundations, installation of deep foundations, such as micropiles, drilled piers and driven steel and concrete piles, helical mini-piles, and proprietary deep foundations such as auger-cast-piles and torque-down piles, installation of ground improvement elements, such as drilled-displacement sand-cement columns and permeation grouting, and installation of shoring, including tiebacks and soil nails.

Krystian Samlik, P.E., Mr. Samlik is a Project Engineer of Rockridge Geotechnical. He received a Bachelor of Science degree and a Master of Science degree in Civil Engineering from California Polytechnic State University, San Luis Obispo in 2012 and 2013, respectively.

Mr. Samlik has provided construction observation, engineering analysis, project management, and geotechnical investigation services for a wide range of projects across the greater San Francisco Bay Area. He has performed geotechnical investigations and studies to develop geotechnical recommendations for the design and construction of low-rise to high-rise residential and commercial developments and for projects with deep excavations.

Mr. Samlik has evaluated slope stability for shorelines and embankments, designed and prepared design submittals for drilled displacement sand-cement column ground improvement systems to mitigate the effects of weak, highly compressible, or potentially liquefiable soils on proposed developments, and performed geotechnical engineering analyses for ground settlement, shallow and deep foundation design capacities, shoring design, and retaining wall designs. He also has extensive experience in geotechnical construction observations, including site grading and fill placement, installation of shallow and deep foundations, installation of proprietary deep foundations, ground improvements, and installation of temporary shoring, tiebacks, and soil nails.



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EXHIBIT 3



OUR PERSPECTIVE

Critical Thinking to Challenge the Status Quo



The apex of applied technology and humanism.

At Holmes, we pursue bold ideas and possibilities. We challenge the status quo with great thinking, never bound by the rote application of rules. We pioneer new standards and technologies, working together to solve tough challenges with creativity, technical expertise—and good old fashioned elbow grease.

We are at the apex of applied technology and humanistic view point. As structural engineers and fire engineers, our designs influence the built world, not only in aesthetics and function but with a large



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Reaching New Heights

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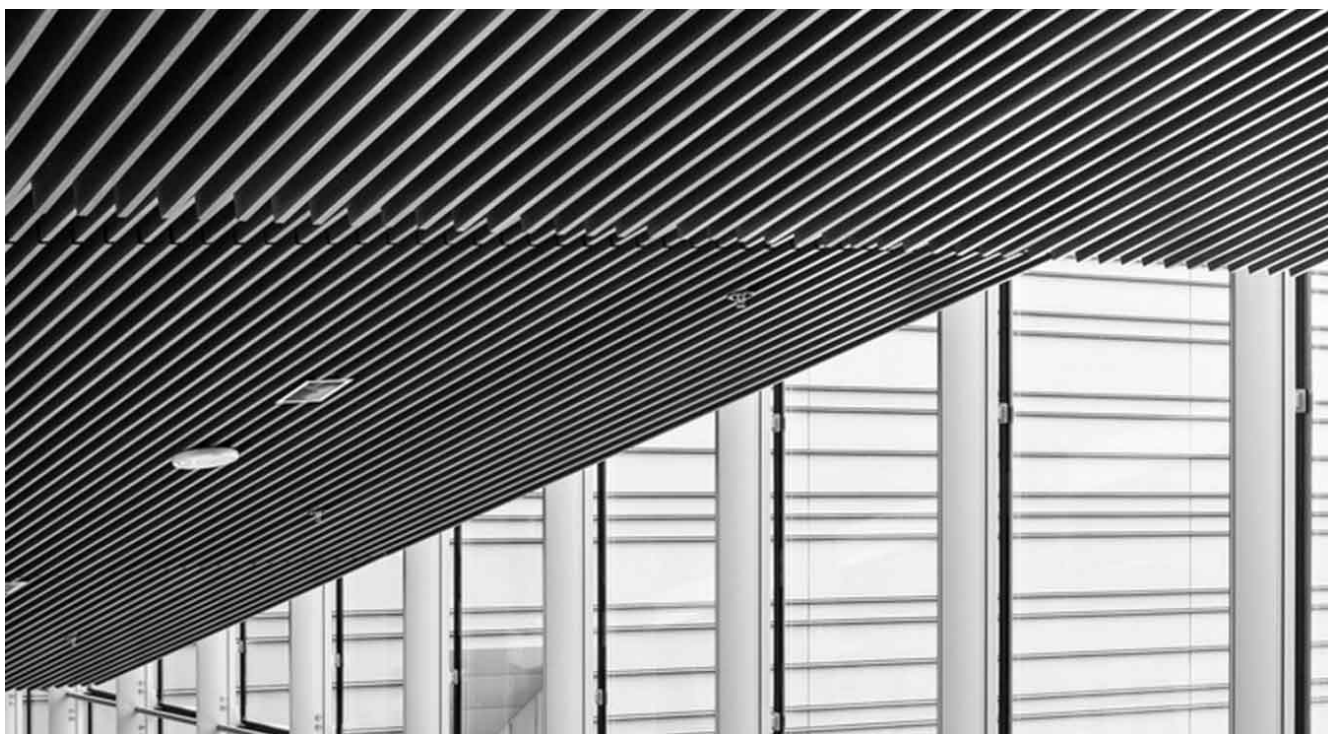
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Australia Netherlands New Zealand USA

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From: [Lawrence S. Bazel](#)
To: [Plater, Brent@BCDC](#)
Cc: [Malan, Margie@BCDC](#)
Subject: RE: 224 Sea Cliff, San Francisco
Date: Monday, May 9, 2022 9:05:16 AM
Attachments: [image514147.jpg](#)
[exhibit 4.pdf](#)

Brent,

I'm attaching Dr. Gilpin's resume as Exhibit 4 to the statement of defense. It was referred to in the statement but not attached. The reason I'm submitting it Monday morning rather than Friday afternoon is that the website link wasn't working and Dr. Gilpin wasn't available to provide a copy.

Larry



LAWRENCE S. BAZEL
235 Montgomery Street, Suite 935
San Francisco, California 94104
Direct:(415) 402-2711

From: Lawrence S. Bazel <lbazel@briscoelaw.net>
Sent: Friday, May 6, 2022 2:04 PM
To: Plater, Brent@BCDC <brent.plater@bcdc.ca.gov>
Cc: margie.malan@bcdc.ca.gov
Subject: 224 Sea Cliff, San Francisco

Brent,

Here's the statement of defense. Please call with any questions.

Larry

EXHIBIT 4

Gilpin Geosciences, Inc.

976 Fiery Run Road
PO Box 370
Linden, Virginia 22642

tel. 415-686-0584

Lou M. Gilpin, Principal Geologist

RESUME

REPRESENTATIVE EXPERIENCE

Dr. Gilpin has over 35 years of experience analyzing geological hazards in California and Alaska. He has provided geological and geotechnical consultation over the last 25 years for projects in northern California including commercial and residential developments, utility facilities, transmission lines, and highways. Geologic hazard evaluations include such projects as 4th Bridge Crossing of the Panama Canal, Mills Peninsula Hospital in San Mateo, 2016 Casitas Avenue Landslide in San Francisco, coastal bluff development in San Francisco and San Mateo Counties, the Stanford Linear Accelerator in Menlo Park, water tank siting for the Cities of Burlingame, Millbrae and Hillsborough, and a liquid gas transportation facility in Valdez, Alaska.

Since 1999 he served ten times as a member of the San Francisco Department of Building Inspection (DBI) Structural Advisory Committee for proposed development landslide hazard areas of the City. He continues to provide peer review for San Francisco and other municipalities in the greater Bay Area.

He acted as the chair of the Peer Review Committee for the Hunters Point Shipyard Parcel A Development, constructed by Lennar. He has also provided consultation to the DBI on the rock fall hazards at the Stoneridge/Saddleback residential developments near the Cow Palace and the 455 Vallejo Street Telegraph Hill rock slide. He was appointed to the California OSHPD Hospital Building Safety Board in 2012, and chairs the Instrumentation Committee for that Board. He also accepted a position on the Engineering Criteria Review Board of the San Francisco Bay Conservation and Development Commission.

EDUCATION

University of California, Santa Cruz, Ph.D., 1995: Earth Sciences emphasis on paleoseismicity and earthquake ground surface deformation.

Cornell University, Ithaca, New York, M.S., 1982: Geological Sciences: Geomorphology and tectonics.

University of Pennsylvania, Philadelphia, B.A., 1979: Geology and Env. Studies.

PROFESSIONAL HISTORY

Engineering Criteria Board, Bay Conservation and Development Commission, 2013-17.

California Hospital Safety Board, OSHPD, 2012-20

Gilpin Geosciences, Inc., Principal Geologist, 1996 – date

Director of Engineering Geology, Langan Treadwell Rollo, 1/2015-8/2016

University of California, Santa Cruz, Earth Sciences Dept., Lecturer, Fall 1995

Harlan Miller Tait Associates, project geologist, 1986-1989

U. S. Geological Survey, Menlo Park, CA, geologist, 1983-1986

REGISTRATIONS AND CERTIFICATIONS

California: Engineering Geologist 1518 (1990); Professional Geologist 4490 (1988)

Some of Dr. Gilpin's more recent professional assignments include:

ENGINEERING GEOLOGIC PROJECT:

Slope Stability Evaluations for Ten Separate Projects on Camino del Mar/Sea Cliff San Francisco Coastal Bluff Sites. Provided engineering geological evaluations for due diligence real estate purchases, infrastructure improvements, and slope stabilization projects adjacent to and in the vicinity of the China Beach Park. Slope evaluations on 300 and 308 Sea Cliff Avenue are immediately adjacent to the eastern Distressed Slope described in the Scope and Cost Validation Report (PMIS: GOGA-004378).

Wilson Landslide Evaluation for Lawrence Hall of Science and Lawrence Berkely Laboratory, California. Providing engineering geological evaluation for a recently completed landslide repair by others. Peer review of the completed slope stabilization and an evaluation of causation assisted the University of California office risk assesment assign financial responsibility for the landslide repair.

Rock Quality Evaluation for Mormon Island Subsidiary Dam Seismic Improvements Providing engineering geological consultation regarding the construction-related drilling performance for the seismic upgrade of the dam. Working with Malcolm Drilling Company to characterize the bedrock quality encountered during secant pile retaining wall construction during the U.S. BLM project construction at the Folsom Lake Reservoir.

4th Bridge Crossing Panama Canal, Panama City, Panama. Providing engineering geological services for design build contract documents. Geologic hazards include strong ground shaking and ground rupture from nearby Pedro Miguel fault as well as characterizing rock quality for the tower foundations.

Linac Coherent Light Source II Tunnel, Stanford Linear Accelerator , Menlo Park, California. Providing engineering geological services for design investigation including rock core boring, rock characterization and geologic mapping. The new facility is a 12 diameter by 2,300 feet long tunnel located adjacent to the existing LCLS.

Fault Rupture Hazard Evaluation Consultation, Nicolas Reservoir, Rancho California Water District, Temecula, California. Consulted to Kennedy Jenks, project engineer. Performed research site review and peer review

Geologic and Geotechnical Investigation, Gateway Valley, Orinda, California. Geologic and geotechnical investigation of an approximately 1,000-acre hillside property proposed for a golf course and residential development. Significant site development considerations included several 70 feet deep ancient bedrock landslides.

Rock Slope Topple Failure Design Investigation, Monitoring, Construction Observation and Litigation Support, Residential Condominium, Larkspur, California. Consulted with Treadwell & Rollo, Inc. to both homeowners association and City of Larkspur during repair of rock slope. Detailed geologic mapping and analysis of bedrock structure data collected from surface and subsurface exploration resulted in a tie back and concrete grade beam repair of the 65 foot-high slope.

Structural Advisory Committee Member, 315 & 319 Edgehill Way, San Francisco, California. Public forum peer review for high risk hillside residential development project on south side of Knockash Hill. Committee consisted of geotechnical engineer, structural engineer and engineering geologist. Residents, developers, and geotechnical consultants presented the proposed residential design, and raised issues regarding the geologic hazards and impacts associated with the development.

Fault Hazard Investigation for Unity High School, Oakland School District, Oakland California. Performed exploration and geologic mapping to identify fault rupture hazards in the Hayward Fault zone near the Oakland Zoo for a proposed new school site.

Fault Hazard Investigation for Holy Reeder Church for Redwood High School Relocation, Oakland California. Performed exploration and geologic mapping to identify fault rupture hazards in the Hayward Fault zone near the Oakland Zoo for a proposed new school site.

Fault Hazard Investigation for Hillside Elementary, San Leandro School District, San Leandro, California. Performed exploration and geologic mapping to identify fault rupture hazards in the Ashland Fault zone in San Leandro for a proposed new school addition.

Geologic and Geotechnical Slope Stability Study of Alcatraz Island for Foundation and Structural Upgrade of Industries Building and Storehouse, San Francisco, California. Conducted a geologic and geotechnical investigation for U.S. Park Service in cooperation with Treadwell & Rollo, geotechnical engineers.

Geologic and Geotechnical Slope Stability and Foundation Study of Lower Yosemite Falls Trail for Lawrence Halprin Associates, San Francisco, California. Conducted geologic mapping of lower falls alluvial fan and flooding potential for consideration of redesign of the Lower Yosemite Falls trail.